

**FURTHER PROPOSAL ON THE SUBMISSION OF DATA
CONCERNING AFFILIATED PARTIES**

Paper from Japan

The following communication, dated 13 October 2005, is being circulated at the request of the Delegation of Japan.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/244), also be circulated as a formal document.

Introduction

This paper is intended to lead to a deeper discussion of the severe burdens that respondents experience when compelled to provide data of their “affiliates”, and how these burdens can be reduced while retaining the integrity of AD disciplines. In an AD investigation, the authorities often require the respondents to collect and submit data concerning their affiliated parties. Such data include a variety of information such as the production costs of parts that the affiliate sells to the respondent and financial data. Respondents also must provide detailed sale-by-sale information on affiliates’ resales of the subject products to independent third parties, and relevant selling and movement expenses.

Respondents often face severe burdens in obtaining information from their affiliated parties. In particular, Members’ investigating authorities currently apply a very low standard in deeming parties “affiliated” (often the standard is five percent ownership by one party in the other, or even less). In such cases affiliated parties tend to be reluctant to provide important confidential business information unless they are convinced that it is in their economic interest to do so. Respondents often must struggle through difficult negotiations with their affiliated parties to obtain such data, especially when they are remotely related to each other. Preparing large amounts of data concerning affiliated parties in the early stage of an investigation may place an unreasonable burden on the respondents.

On the other hand, it is understandable that investigating authorities may need to collect information from affiliates. Sometimes affiliates’ operations are pertinent to the calculation of the dumping margin. For example, close affiliation could affect the prices at which an affiliate sells inputs to a respondent, and such prices might not reflect the actual production and sales activities that the affiliate performs. Authorities thus would like to collect information on those operations, in order to ensure that the margin of dumping in the investigation is based on performed on the basis of positive, accurate, and reliable information that is not distorted by non arms’ length dealing.

Thus, it is important that the AD Agreement set out a rule which properly balances the investigating authorities' interest in obtaining information concerning respondents' affiliated parties with respondents' interest in avoiding undue difficulties when submitting such information.

In balancing these two interests, it would be fair to assume that respondents are capable of collecting affiliates parties' data where a "control" relationship exists. Where the respondent controls the affiliate, the respondent should have less difficulty in obtaining the cooperation of its subordinate affiliated party. Similarly, where the affiliated party controls the respondent, the entities' close relationship suggests a substantial identity of interest between the parties, and therefore the respondent should be able to collect information from its "affiliated" party. On the other hand, it is unreasonable to require a respondent to submit information regarding affiliated parties that are not in a "control" relationship with the respondent. In such cases, the respondent lacks either the ability to compel its subordinate affiliate to cooperate or the necessary mutuality of interest that would provide a superior affiliate with the incentive to cooperate.

Thus, it is unreasonable and unjust to punish the respondent with adverse facts available, as collection of the requested data was beyond the respondent's means.

The "control" standard for affiliation, which the FANs have proposed¹, would address the concerns of authorities and respondents, as discussed above. It would enhance the predictability and objectivity of anti-dumping investigations to the benefit of the authorities as well as the interested parties.² Moreover, the "control" standard, which is consistent with the widely accepted International Accounting Standard 27, is intuitive and easy to incorporate into the laws and regulations of the Members.

¹ TN/RL/W 146 and TN/RL/GEN/19.

² We are open to further discussion on other issues relating to affiliated parties, including the definition of affiliated parties in the context of Article 2, the arm's length test, and other aspects of affiliation.

Proposal

Add a new subparagraph to Article 6.1 clarifying the criteria when the authorities can require the respondents to submit data concerning “affiliated parties”. The proposed text is as follows:

6.1.4 The authorities may require exporters or foreign producers to submit information of other parties only if such other parties directly or indirectly control, or are controlled by, the exporter or foreign producer; or if the exporter or foreign producer and the other parties are under the common control of a third party. For the purposes of this agreement, “control” is the power to govern the financial and operating policies of an enterprise by having:

- (a) more than one half of the voting power of an enterprise;
 - (b) power over more than one half of the voting rights by virtue of an agreement with other investors;
 - (c) such power under a statute or an agreement;
 - (d) power to appoint or remove the majority of the members of the board of directors or equivalent governing body; or
 - (e) power to cast the majority of votes at meetings of the board of directors or equivalent governing body.
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